IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

CASE NO. 93-159-CF

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD HENYARD,

Defendant.
_____/

ACTIVE DEATH WARRANT
Execution Scheduled for
September 23, 2008 at 6:00 pm

MOTION TO VACATE SENTENCE AND FOR STAY OF EXECUTION

RICHARD HENYARD by undersigned counsel files this motion to vacate his sentence of death pursuant to Fla. R. Crim. P. 3.851, and to stay execution. This is a successive motion filed under Rule 3.851(c)(2).

CASE HISTORY

The State filed three documents on July 14, 2008 respectively titled "Course of prior proceedings and statement of the case and facts," "Issues Raised in Prior Proceedings," and "Index to prior court opinions." The "Issues Raised in Prior Proceedings," accurately quotes the appellate courts' description of the issues that were raised on direct appeal, in state postconviction proceedings and on federal review, and their disposition. The procedural information contained in these filings is accurate and to the extent that it satisfies certain pleading requirements of the Rule, that information is incorporated herein.

The death warrant is dated July 9, 2008. At the time it was signed, Henyard's appeal of this Court's summary denial of a successive motion for postconviction relief, which he had filed on October 18, 2007, was still pending in the Florida Supreme Court. That motion was

essentially the same as other such motions which had been filed by Florida death row inmates challenging the state's lethal injection method of execution. On April 23, 2008, Henyard filed a motion to amend the October 18, 2007 motion in light of *Baze v. Rees*, 128 S.Ct. 1520, 170 L.2d 2d 428 (2008). The Court denied the motion due to lack of jurisdiction because Henyard had already filed a notice of appeal. Henyard then filed a motion in the Florida Supreme Court to relinquish jurisdiction.

The day after the warrant was signed, the Florida Supreme Court issued an order that established an expedited litigation schedule and stated that "Appellant's Motion to Relinquish Jurisdiction to the Trial Court in Light of *Baze v. Rees* is hereby denied; however in light of the scheduled execution of appellant on September 23, 2008, the trial court has jurisdiction to consider any successive motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851."

CLAIM I

MR. HENYARD'S SENTENCE OF DEATH IS CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AND CORRESESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AS ESTABLISHED BY NEWLY DISCOVERED EVIDENCE.

To satisfy the standard for collateral relief based on newly discovered evidence, it is necessary for a court to conduct a two part analysis that must be satisfied in order to set aside a conviction or sentence on the basis of newly discovered evidence. First, in order to be considered newly discovered, the evidence "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known [of it] by the use of diligence." *See Lightbourne v. State*, 841 So.2d 431, 440

(Fla. 2003), quoting *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998). Second, "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." *Id.* With regard to newly discovered evidence pertaining to the penalty phase, the standard for the second prong is whether the evidence would probably lead to a life sentence on retrial. *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1991).

The substance of this claim is based upon an affidavit executed by Jason Nawara on July 24, 2008, which is attached to this motion. See Appendix B. Mr. Nawara who is serving a sentence at Jefferson Correctional Institution is available to testify to the substance of his statements which provide that: In 1993, Mr. Nawara, who was then fourteen years old, was arrested for first degree murder. While awaiting trial, he was housed in the Lake County Jail with Mr. Henyard's co-defendant, Alfonza Smalls, who was also fourteen years old and awaiting trial for his role in the case at hand. Mr. Nawara states in the affidavit that during the fourteen months that they lived together in the same quad, he heard Mr. Smalls state in a group setting on several occasions, "I'm a killa, you just a car thief" and "I've killed before and I'll kill again." According to Mr. Nawara, he could tell that Mr. Smalls was "dead serious" when he made these statements. Furthermore, Mr. Nawara states that Mr. Smalls never denied killing the victims in the instant case, nor did he say or insinuate that Mr. Henyard killed the victims.

The testimony by Mr. Nawara meets the first prong of the test for newly discovered evidence because it was not known to the trial court or defendant's counsel and it could not have been known by the defendant or counsel by the use of due diligence. At the time of Mr. Henyard's trial in May and June 1994, Mr. Nawara's case was still pending. Because Mr. Nawara was represented by an attorney at the time, Mr. Henyard's trial attorneys would not have been able to approach him to speak about what Smalls said while they were incarcerated

together. Therefore, this evidence was not available at the time of Mr. Henyard's trial and is newly discovered.

The second prong of the test for newly discovered evidence is also met because it would likely lead to a life sentence on retrial. Although Mr. Henyard confessed to raping and shooting Ms. Lewis and being present when Jasmine and Jamilya were shot, he continuously denied that he shot the girls. *Henyard v. State*, 689 So.2d 239 (Fla. 1997). Likewise, defense counsel argued at trial that although Mr. Henyard was involved in the crime, it was Mr. Smalls and not Mr. Henyard who shot Jasmine and Jamilya. ROA at 1106-07. Mr. Nawara's testimony supports Mr. Henyard's statement and defense counsel's argument at trial that Mr. Henyard did not shoot the girls. A statutory mitigating circumstance under Florida Statutes 921.141(d) is that "[t]he defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor." The fact that it was Mr. Smalls and not Mr. Henyard who shot Jasmine and Jamilya mitigates Mr. Henyard's culpability and establishes an additional statutory mitigating factor under 921.141(d), which was not established at trial. Additionally, Mr. Smalls was the one who accosted Mrs. Lewis and her children at the Winn Dixie as they were leaving. Mr. Smalls called for Mr. Henyard to come to the car and drive. And it was Mr. Smalls who bragged to others in the detention center that he was a "killer." Mr. Smalls who is the more culpable in the murders of Jasmine and Jimilya received a life sentence because of his age; however, Mr. Henyard received a death sentence for being eighteen years and six months over the age requirement for being a juvenile. However, the mitigation at trial established Henyard's emotional maturity between ten and thirteen years of age, which this court specifically found to be age thirteen, which is vastly different than his eighteen years of age at the time of the crime. When one weighs this evidence which would have established a valid mitigator along

with the mitigators established at trial against the aggravating circumstances, the jury which was clearly at odds when they changed their vote three times (ROA at 2557), likely would have recommended a life sentence for Mr. Henyard.

CLAIM II

MR. HENYARD'S CUMULATIVE MENTAL AND EMOTIONAL DEFICITS ESTABLISH A CONSTITUTIONAL BAR TO HIS EXECUTION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISISIONS OF THE FLORIDA CONSTITUTION.

Mr. Henyard has mental and emotional disabilities due to impairments in brain functioning that affect him in the same way as mental retardation, and these limitations were apparent long before he turned eighteen years old. Although, Mr. Henyard's IQ score did not fall below two standard deviations when it was measured by standard IQ tests, this does *not* mean that Henyard does not have a claim that his execution is barred due to intellectual disability. Henyard's impairment has produced a disability that is identical to mental retardation in its disabling features, as those features were described in *Atkins v. Virginia*. 536 U.S. 304, 122 S.Ct. 2242, 53 L.Ed. 335 (2002). Mr. Henyard's mental and emotional disabilities preclude his execution under the Eighth and Fourteenth Amendments.

The *Atkins* Court rested its decision on two foundations. The first is that people with "disabilities in areas of reasoning, judgment, and control of their impulses" rising to the level of mental retardation "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306. The second foundation is the disadvantage experienced by people with retardation in legal proceedings:

> The reduced capacity of mentally retarded offenders provides a

> second justification for a categorical rule making such offenders ineligible for the death penalty. The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty,' Lockett v. Ohio, 438 U.S. 586, 605 (1978), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.

Id. at 320 (footnote omitted). These principles apply equally to Mr. Henyard's deficits.

The *Atkins* Court elaborated on the disabilities in areas of reasoning, judgment, and control of their impulses that affect people with mental retardation:

> [T]hey have diminished capacities to understand and process information, to abstract and process information, to engage in logical reasoning, to control impulses, and to understand the reactions of others . . . [T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Id. at 318 (footnotes omitted).

These disabilities are the limitations in adaptive behavior that are characteristic of mental retardation. These disabilities are frequently produced in people who have mental retardation by significant limitations in intellectual functioning, as measured by IQ tests. However, these very same disabilities can be produced by brain impairments not associated with significant limitations in intellectual functioning. The Eighth Amendment logic of *Atkins*, therefore, applies to Henyard. While Henyard's deficiencies do not warrant an exemption from criminal sanctions, they do diminish his legal culpability. *Atkins*, 536 U.S. at 320.

An examination of Henyard's background reveals that he has the significant limitations in adaptive behavior that the Supreme Court identified as characteristic of mental retardation:

Diminished capacities to understand and process information

Henyard struggled throughout school. He was diagnosed with a specific learning

disability from an early age. Dr. Toomer's examination revealed that he had significant deficits in processing information and cognitive function. The School Child study team reported that test data was suggestive of organically based problems (brain involvement impairing his abilities versus emotional issues). Henyard received special education services off and on throughout his academic career, and was retained in first and eighth grades. Dr. Toomer reported a full scale IQ of 85. Dr. Bauer found full scale IQ of 88. Both reported significant differences between Henyard's verbal and performance IQ scores, suggesting impairment in the right hemisphere of his brain.

Diminished capacities to engage in logical reasoning

During the course of events during the crime show Henyard's lack of logical reasoning. Henyard drove the victim's car back to the area closest to where he lived but previously told several witnesses that he had stolen a car. He abandoned the car near a school where it was quickly found but kept the car keys in his jacket. There is no logical reasoning why Henyard would keep the victim's car keys upon abandoning the car. Additionally, the codefendant's bloody clothes were left near the car. Mr. Smalls was cognizant enough to change his clothes; however, Mr. Henyard went to the police station the next day with the shorts and shoes he had on the night of crime. Mr. Henyard's diminished capacity did not allow him to comprehend or process how keeping the victim's keys upon abandoning the car or remaining in the same clothes that he wore when the crime was committed could be collected as evidence which could be used against him at trial. Many would classify this as being illogical or not demonstrating sound judgment.

Diminished capacities to control impulses

Henyard had no prior adult record however there were some indicators which included

petty thievery. Henyard was noted in school records that he was throwing welding rods and metal in shop class. In a separate juvenile offense, Henyard was involved in a robbery and breaking and entering and received juvenile sanctions. Henyard was also charged with grand theft of a motor vehicle involving his Aunt Jackie which was later dismissed. Even after using his Aunt's vehicle without consent, upon release from the county jail, Henyard went to his Aunt's home because he had nowhere else to go and she allowed him to stay there. Henyard's background and development left him with the inability to control minor impulses. Mrs. Jackie Turner is available to testify that Henyard's biological mother was a petty criminal and would earn extra money from thievery. On several occasions she would take Mr. Henyard with her and require him to steal. Although Ms. Jackie tried to instill in Henyard good values, she never tried to keep Mr. Henyard from spending time with his mother or replace her in his eyes. Mr. Henyard's cognitive growth and development was comprised from witnessing and participating from early childhood years in his mother's crimes.

Diminished capacities to understand the reaction to others and being a follower rather than leader in group setting

Henyard had very limited social skills and was very withdrawn growing up. He had no significant father figure and had a neglectful mother who rarely accepted her responsibilities as a mother. Henyard had an overwhelming need to be accepted by others and usually associated with younger children. When Henyard was scheduled to advance to high school, he begged and pleaded with his mother to allow him to remain in middle school. Upon learning of Henyard's request, Mrs. Jackie Turner is available to testify that she pleaded with Henyard's mother to help him to understand that his age required him to advance in school and social settings and not remain behind because his friends were still attending middle school. Henyard's mother was

very detached and unwilling to help Henyard to develop the necessary social skills which would have strengthened his emotional development and maturity. Henyard's mother allowed him to remain the child that watched his mother walk by him standing in the doorway and not acknowledge his existence. Even after the crime was committed Henyard passively remained silent while Smalls and Emmanuel Yon who was an accessory after the fact, bragged about raping a white woman. The victim was African American.

Emotional retardation

Records indicate that while Henyard did not meet the criteria for being mentally retarded at the time of the crime, he does show a combination of deficits that rendered him substantially different from the average adult at the time of the crime. The deficits include an extremely low emotional age that can be conceptualized as emotional retardation. Records indicate a long pattern of biological-based learning problems in early childhood, traumatic neglect, and emotional impoverishment that combined to caused him to be functioning at a substantially subnormal level at the time of the crime, and to be functioning in the area of a ten and thirteen year old emotionally, according to Drs. McMahon and Toomer respectively.

Henyard's prior diagnosis of learning disorder meets the statutory definition (6A-6.03018). The specific type of learning disorder, identified as a Nonverbal Learning Disorder, is gaining acceptance and it is felt to negatively affect the individual's ability to perceive interpersonal and emotional situations.

Recent research indicates that emotions are a part of cognition (thinking) that have an important role in regulating and modulating behavior and decision-making. Research also indicates that emotional development and the ability to make emotional and social judgments is a skill that begins developing very early, as an infant, and is shaped by both neuropsychological

(brain-based) factors such as nonverbal abilities, as well as early emotional environmental influence such as a maternal bond. Henyard was abandoned by his mother from the age of two months. And although she was physically present at times, she did not bond with Henyard nor demonstrate any emotional connection with her child. Henyard's impaired caregiving at infancy produced avoidant/disorganized attachment which compromised his emotional maturity. Attachment disorganization and subsequent severe and chronic trauma, which is incorporated by reference to claim three, disrupts the neurological development and comprises social and cognitive and emotional impairment.

Recent research supporting this allegation include:

1 Early emotional competence is related to early childhood adjustment (Miller, Fine, et al 2006).

2 Petrides and Perez Gonzalez, 2007 - Emotional intelligence plays a role in personality, clinical, social psychology with effects that are incremental over the basic dimensions of personality and mood.

3 Storbeck, 2007 - One function of affect (emotional) is to regulate cognitive processing.

4 Eder, 2007 – There is a significant movement suggesting that cognitive research paragraph that affect and emotion are related.

5 Duncan, 2007 – Affect/emotion performs several basic cognitive functions and the affect/and the emotion/cognition distinction is phenomenological rather than ontological.

6 Kobiella, 2007 – Found that even infants are able to discriminate between and respond to negative emotions, and instances as early as seven months show a response at the electrophysiological level to negative emotions.

7 Pearlman, 2008 – Maltreated children's reasoning about emotions suggest that their reasoning about emotions is critically related to their experience (maltreatment experience in children's understanding of emotion).

Allowing Mr. Henyard to proceed on an *Atkins* claim based on brain impairment and mental deficiency rather that significantly sub average IQ is consistent with current research. In

WHAT IS MENTAL RETARDATION: IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY (H. Switzky and P. Greenspan ed., AAIDD 2006), the editors explained that adaptive behavior should be the determinative factor in diagnosing mental retardation, because it is the way in which intellectual disability manifests itself in a person's life. In the newest commentary on the 10th edition of its manual, MENTAL RETARDATION DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (AAID 2002), the AAIDD sets out the following guideline:

> In the evaluation of school-related adaptive behavior or in the interpretation of adaptive behavior/direct observation, the assessment should focus heavily on functional systems of assessment with an emphasis on adaptive behavior. This is because (a) adaptive behavior examines aspects of intelligence and functioning that cannot be ascertained on the basis of an IQ test, and (b) adaptive behavior gets at the core of what MR/ID is as a construct of disability.
>
> AAIDD, MR Manual User's Guide (2007) (emphasis added). Switzky and Greenspan propose a modification of the definition of retardation that puts the emphasis on limitations in adaptive behavior The solution seems fairly simple, and that is to reverse the order of the wording . . . Doing so , the definition might read as follows: 'MR is a form of disability, first suspected in childhood or adolescence, that is characterized by significant deficits in adaptive social, academic and practical functioning that are attributable to significant limitations in the ability to think and process information adequately.' This proposed definition does several things that could, if taken seriously, serve to finally put 'King IQ' in its place and raise adaptive behavior -- termed 'adaptive functioning' to free ourselves from all of the baggage associated with that poorly defined term -- is now put toward the beginning of the definition, such that the starting point for the for the diagnosis is now establishing limitations in adaptive rather than first establishing limitations in intelligence. By describing the intellectual criterion with the nonjargon words 'ability to think and process information,' we are indicating that what is important is not a score on an IQ test but an exploration of an individual's intellectual processes. However, by inserting the words 'that are attributable,' we hope to indicate that adaptive behavior deficit is not separable from intellectual deficit, but rather flows from it.

Switzy and Greenspan, *supra.*

Henyard's intellectual disability meets this definition. He has "significant deficits in

adaptive social, academic, and practical functioning that are attributable to significant limitations in the ability to think and process information adequately" that were first observed in his childhood and adolescence. Mrs. Jackie Turner is available to provide background testimony regarding Henyard's adolescent development and his mother's lack of attachment with him from infancy. Since adaptive behavior "gets at the core" of what mental retardation is, Henyard meets the criteria of *Atkins* and his execution is barred by the Eighth and Fourteenth Amendments to the U.S. and Florida Constitutions.

CLAIM III

MR. HENYARD'S MENTAL ILLNESS AT THE TIME OF THE OFFENSE AND AT PRESENT RENDER HIS DEATH SENTENCE AND IMMINENT EXECUTION UNCONSTITUTIONAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

All allegations regarding the Defendant's mental condition asserted elsewhere in this motion are incorporated herein.

Undersigned counsel has retained Dr. Janice Stevenson, Ph.D., an expert in the field of child and adolescent clinical psychology, whose address is:

COLUMBIA MENTAL HEALTH RESOURCES, INC.
10632 LITTLE PATUXENT PARKWAY, SUITE 311
COLUMBIA, MARYLAND 21044
410 730-6950 410-905-4763 FAX: 410 730-1411
janstevson1@comcast.net

Dr. Stevenson will be available to testify on reasonable notice.

Dr. Stevenson has conducted a clinical evaluation of Mr. Henyard, which is attached as R and reports a diagnosis of:

Mr. Henyard demonstrated and confirmed presence of behaviors

consistent with persons diagnosed with Post Traumatic Stress Disorder, chronic and severe, undiagnosed and untreated
Axis II: Dependent Personality Disorder with Dissociative features
Axis III: Skin Rashes
Axis IV: Legal, Primary Support, Housing

This diagnostic profile and the accompanying traumatizing sexual abuse events had a direct and diagnostic impact upon the crime for which Mr. Henyard was convicted. Mr. Henyard unconsciously re-enacted the concrete elements of his physical and sexual abuse as a very young child in the elements of his crime, the revelation of which resulted in an emotional catharsis by Mr. Henyard. Mr. Henyard passively followed the directions of a younger 'friend' so that he would not lose the friendship of someone who did not tease, fight, or torment him, like peers had since elementary school. That revelation allowed Mr. Henyard to recognize that this person, his co-defendant was not a friend because "friends would not do that (lead one into a crime) to a friend." The sexual assaults of the victim were emotional and physical re-enactments of the prostitution exposure for the little boy as Mr. Henyard sat on the trunk of the car watching as his co-defendant raped the victim.

Mr. Henyard has evolved a passive, reactive belief system in a child's effort to make sense of repeated episodes of neglect, physical abuse, abandonment, and sexual abuse from his early childhood through adolescence by his primary caregivers. His relationships and decision making ability since his early latency and adolescent years have been defined and compromised by the trauma of the abuse by his stepmother and the dominance (or submission) and power (or powerlessness) inherent in that abusive relationship. The impact of the multiple neglect and abandonment events was further compromised by dissociation and detachment (as coping mechanisms) in the years preceding the commission of the crime, and was negatively affected by adolescent drug addiction.

Over the course of his life, Mr. Henyard has masked a Passive Personality Disorder with a false bravado. He has evolved a collection of defense mechanisms that have merged into a dependency on younger persons so that he can perceive himself as safe and attempt to believe his social value as a friend.

TRAUMA HISTORY: In an assessment to identify important life experiences that can affect a person's emotional well-being or later quality of life. The events are far more common than most of us

realize. Mr. Henyard indicated that he had experienced:

> The sudden and unexpected death of a close friend or loved one due to murder to which he experienced intense fear, helplessness and horror when it happened.
>
> Being robbed and being present during a robbery in which the robber used or displayed a weapon.
>
> Being hit and beaten up and badly hurt by a stranger or someone he didn't know very well more than five times and in which he was seriously injured.
>
> Seeing a stranger or someone he didn't know very well attack and beat up someone and seriously injure or kill him or her three times.
>
> While growing up, he was physically punished in a way that resulted in bruises, burns, cuts, or broken bones more than five times to which he experienced intense fear, helplessness, and horror when it happened.
>
> Before his thirteenth birthday someone who was at least five years older than he touched and fondled his body without his consent and against his will in a sexual way and make him touch and fondle his body in a sexual way at least twice. The person was a friend or acquaintance. He experienced intense fear, helplessness, and horror when it happened.
>
> When he was sixteen years old, his intimate partner had an abortion without his consent and against his will to which he experienced intense fear, helplessness, and horror when he learned about it.
>
> He has experienced and seen events that were life threatening, caused serious injury, and were highly disturbing and distressing (his case) to which he experienced intense fear, horror, and helplessness when it happened.
>
> The sum total of his life experiences meets five out of the six criteria for Post Traumatic Stress Disorder, Severe, and Chronic. In addition, he reported and documentation confirms that he experienced years of repeated abandonment and neglect by each of his parents and his secondary significant caregiver.

The Defendant's mental condition at the time of the offense bars the death penalty under

the rationale of *Atkins*, 536 U.S. 304 and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The Eighth Amendment prohibits "excessive" sanctions. A claim that punishment is excessive is judged by the evolving standards of decency that mark the progress of a maturing society. Persons suffering from mental illness to the same degree as Henyard by definition have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. While their deficiencies may or may not warrant an exemption from criminal sanctions, they do diminish their personal culpability. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), identified retribution and deterrence of capital crimes by prospective offenders as the social purposes served by the death penalty. Unless the imposition of the death penalty on a severely mentally ill person measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment. With respect to retribution, the severity of the appropriate punishment necessarily depends on the culpability of the offender. With respect to deterrence, exempting the significantly mentally ill from execution will not lessen the deterrent effect of the death penalty with respect to offenders who are not severely mentally ill. Such individuals are unprotected by the exemption and will continue to face the threat of execution.

For the foregoing reasons the Defendant's death sentence should be vacated and his execution barred.

The October 18, 2007 Motion for Postconviction Relief

As noted above, Henyard filed a successive motion for post conviction relief on October 16, 2007. The Court summarily denied these claims on January 8, 2008. The motion contained

four claims, three of which have been raised on appeal. Rearranged, they are: 1) Newly discovered evidence shows that Florida's lethal injection method of execution violates the Eighth Amendment; 2) Fla. Stat. 945.10 (2006) as implemented by the protocols, which conceals the identity of the participants in an execution, is unconstitutional; and 3) Fla. Stat. 27.702, which as interpreted by the Florida Supreme Court in *Diaz v. State*, 945 So. 2d 1136 (Fla. 2006) prohibits CCRC from filing a 42 U.S.C. § 1983 federal rights suit challenging lethal injection, is unconstitutional. The trial court summarily denied these claims on January 8, 2008. In light of the Florida Supreme Court's directive that this Court has jurisdiction to consider any motion filed pursuant to Rule 3.851 and this Court's earlier denial of Henyard's motion to amend the October 18, 2007 predicated on finding a lack of jurisdiction the three claims are reasserted here with a brief update.

Under the Florida Constitution, Florida's interpretation of the Eighth Amendment prohibition against cruel and unusual punishment must be in conformity with the United States Supreme Court's Decisions. Art I, § 17 Fla. Const.; See also *Lightbourne*, 968 So.2d at 334. Although *Baze* had not been decided at the time Mr. Henyard filed his successive motion, this Court is bound to follow *Baze* because it is a decision of the United States Supreme Court. His claim is not based on an isolated mishap, but rather on the assertion that the current (August 1, 2007) Florida Department of Corrections protocols and their proposed implementation were defective. The botched execution of Angel Diaz is not an isolated incident, but rather is evidence of the problems inherent in Florida's lethal injection method of execution. The Florida Supreme Court's reaffirmation of an inherent cruelty standard in *Lightbourne v. McCullum*, 969 So. 2d 326 (Fla. 2007) and *Schwab v. State*, 969 So. 2d 318 (Fla. 2007), on which this Court expressly relied, is now in conflict with the plurality opinion in Baze and with the position taken by all but

two of the members of the Supreme Court.

Nor is the claim procedurally barred. F.S. 922.105 providing for execution by lethal injection is not self implementing, it must be implemented in accordance with the protocols written by the Florida Department of Corrections. The current protocols were published on July 31, 2007 and are commonly styled the "August 1, 2007 protocols." Claims based on either the protocols themselves or their implantation by DOC personnel did not exist within one year of the enactment of the lethal injection statute. In *Schwab*, the Florida Supreme Court held that Schwab's claim that Florida's lethal injection protocol violates the Eighth Amendment was not procedurally barred because, like Mr. Henyard, Schwab relied on the execution of Angel Diaz and the newly created lethal injection protocols in his claim. *Schwab v. State*, 969 So.2d 318, 321 (Fla. 2007).

Mr. Henyard's F.S. § 27.702 claim was originally filed in October of 2007. The claim as stated in the successive Rule 3.851 motion acknowledged this Court's decision in *Diaz*, but argued that Mr. Henyard and any other similarly situated death row inmate should not have their right to challenge the constitutionality of lethal injection in a federal proceeding impaired or extinguished because of the arbitrary constraints of § 27.702. The statutory limitation on CCRC is an unconstitutional deprivation of due process, access to the courts, equal protection and the protection against cruel and unusual punishment as embodied in the federal constitution.

Some of the events that gave this claim more force occurred during the second week of November, 2007, immediately after the Florida Supreme Court had denied all relief in *Schwab,* 969 So. 2d 318. Schwab then filed an application to file a successive habeas petition challenging Florida's method of execution in the US Eleventh Circuit Court of Appeals. That court denied Schwab's application because Schwab could not meet the stringent requirements of a successive

28 U.S.C. § 2254 petition, but the court added the following language:

> Even if such a claim were properly cognizable in an initial federal habeas petition, instead of in a 42 U.S.C. § 1983 proceeding . . . this claim cannot serve as a proper basis for a second or successive habeas petition.

In Re: Mark Dean Schwab, Petitioner, 506 F.3d 1369 (2007). As the reason for the disclaimer the court cited *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 2099, 165 L.Ed.2d 44 (2006); *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004), *Rutherford v. McDonough*, 466 F.3d 970, 973 (11th Cir.2006) (observing that pre *Nelson* circuit law requiring challenges to lethal injection procedures to be brought in a ' 2254 proceeding is "no longer valid in light of the Supreme Court's Hill decision"). Henyard's argument here is that this language confirms that a federal challenge to Florida's lethal injection method of execution in this circuit must be brought by way of a § 1983 action rather than a § 2254 petition.

There are significant timing issues which apply to this claim in particular. A § 1983 claim carries a two year statute of limitations, but does not require exhaustion of state remedies, unlike the one year statute of limitations and exhaustion requirements of § 2254. The start date for a § 2254 petition is determined by the finality of the judgment and the completion of state postconviction proceedings, whereas the limitations period for filing a § 1983 starts at the accrual of a cause of action. With regard to a proposed method of execution claim, the two events are not only timed differently, they are different in kind.

This issue was recently addressed in *McNair v. Allen*, 515 F.3d 1168 (C.A.11 (Ala.), January 29, 2008). There, the court of appeals held that the two year statute of limitations on § 1983 claim brought by an Alabama death row inmate challenging the method by which he was to be executed began to run, not at time of inmate's execution or on the date that federal habeas

review was completed, but when the inmate, after his death sentence had already become final, became subject to new execution protocol. McNair's start date was found to have been the point at which he opted (by silence, similar to Florida) to be executed by lethal injection rather than by electrocution. However, the court specifically noted that "the statute of limitations began to run at that time; therefore, **absent a significant change in the state's execution protocol (which did not occur in this case)** . . . " *McNair*, 1177 (emphasis added). The court further noted that:

> The dissent notes Alabama's execution protocol is subject to change. Although that is true, neither party suggests the lethal injection protocol has undergone any material change between 2002 and the present.

Id. n.6.

Henyard argues here that significant and material changes in Florida's protocol did occur on August 1, 2007. In fact two of the many changes which occurred are those which have been often cited by the State in rebuttal to claims that Florida's method of execution is constitutional, namely the qualifications of the execution team and the addition of a consciousness requirement. As the Florida Supreme Court stated in *Lightbourne*:

> Section 922.105(1) now provides: "A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution." The statute does not provide the specific procedures to be followed or the drugs to be used in lethal injection; instead it expressly provides that the policies and procedures created by the DOC for execution shall be exempt from the Administrative Procedure Act, chapter 120, Florida Statutes.

Lightbourne, 969 So.2d at 342.

Thus Henyard's cause of action for § 1983 purposes accrued on August 1, 2007 and he has two years from that date to file a claim.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Successive Motion to Vacate Sentence and For Stay of Execution has been furnished by U. S. Mail, first class postage, to all counsel of record on this 4th day of August, 2008.

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